# IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

**FIRST APPEAL No. 898 of 1977**
**with**
**CROSS OBJECTION No.167 of 2005**

**For Approval and Signature:**

**HONOURABLE MR.JUSTICE A.L.DAVE**

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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**THACKER VITHALDAS HARILAL - Appellant(s)**

**Versus**

**PARI ATMARAM MANEKLAL - Defendant(s)**

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**Appearance :**
MR AVINASH K MANKAD for Appellant(s) : 1,
MR AC GANDHI for Defendant(s) : 1,
MR AVINASH K MANKAD for Defendant(s) : 1,
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**CORAM : HONOURABLE MR.JUSTICE A.L.DAVE**

**Date : 16/12/2005**

**ORAL JUDGMENT**

1. By this First Appeal, the appellant-original defendant, challenges the judgment and decree rendered by

learned Judge of Court No.7, City Civil Court, Ahmedabad, on 18th July, 1977 in Civil Suit No.93 of 1973. The said suit was filed by the present respondent for damages on account of failure on the part of the appellant to abide by the contract entered into between them on 19th July, 1972 over telephone in respect of sale of 100 bales of Anjar 797 Red Label Cotton at the rate of Rs.1350/- per candy as per Ahmedabad Dhara on Parakh.

2. The defendant-appellant appeared before the Trial Court and filed written statement contending, inter alia, that there was no contract least breach of any contract and denied the liability to pay damages. The Trial Court, after considering rival side pleadings, framed issues at Ex.33, as under :-

*"(1) Is it proved that the defendant on 19.7.1972 agreed to sell through the plaintiff 100 bales of Anjar 797 Red Label Cotton at the rate of Rs.1350/- per candy?*

*(2) If yes, is it further proved that the defendant failed to give PARAKE of the goods to the buyer and thereby committed breach of the above contract?*

*(3) If yes, is it further proved that the contract was*

*settled at the rate of Rs.1550/- per candy on 1.8.1972 as alleged at paragraph 4 of the plaint and the plaintiff suffered a loss of Rs.10,000/-?*

*(4) Is it proved that the defendant is liable to the plaintiff in the sum of Rs.506.25 for ADAT?*

*(5) Has this court jurisdiction to try the suit?*

*(6) Has the plaintiff no right to file the present suit on the ground that the contract in question was not entered into by the defendant with plaintiff but it was entered into "through plaintiff"?*

*(7) Is plaintiff entitled to interest? If yes, at what rate, from what date and on what amount?*

*(8) What order?"*

The findings on the above issues were given as under :-

*"(1) In the affirmative.*

*(2) In the affirmative.*

*(3) Earlier part not necessary to decide; latter part, Rs.2400/- only.*

*(4) Liable in a sum of Rs.337.50 for Adat.*

*(5) In the affirmative.*

*(6) In the negative.*

*(7) In the affirmative at six percent from the date of the suit on 2737.50 ps.*

*(8) Order as below.”*

2.1 The Trial Court, having, ultimately, partly decreed the suit against the defendant, directing the defendant to pay Rs.2737.50 with 6 per cent interest, the defendant has preferred this appeal.

3. Similarly, on being aggrieved by the judgment, the plaintiff has preferred Cross-Objection No.167 of 2005 (it appears that the Cross-Objections were filed in the year 1977 itself and Cross-Objection bearing Stamp No.18839 of 1977 in First Appeal No.878 of 1977 was recorded. However, the Cross-Objections are recently registered in the record as the registration of Cross-Objection is not found in the computer. However, there is no dispute on the aspect of the respondent having preferred cross-objections within time and having paid for requisite stamps).

4. Learned Advocate, Mr. Mankad, for the appellant has taken this Court through the judgment of the Trial Court as well as the evidence. He submitted that,

although the amount involved in the appeal is too small, there is substance in the appeal and a question of law is also involved.

4.1 Mr. Mankad submitted that the Trial Court has come to a conclusion that, even as per the plaintiff, the oral telephonic contract was on the basis of “Ahmedabad Dhara Parakh Condition”. The plaintiff has not been able to explain as to what is the meaning of this term and, therefore, it was difficult for the Trial Court to come to a conclusion whether the Trial Court has territorial jurisdiction or not. Mr. Mankad submitted that, also on jurisdiction aspect, the case of the plaintiff would be hit by Section 29 of the Contract Act because the terms of the contract are not clear and not clearly explained and in that situation, the suit of the plaintiff could not have been entertained and decreed even in part.

4.3 Mr. Mankad also submitted that there is no evidence before the trial Court to come to a conclusion that the parties did enter into a contract. Neither copy of the so called letter dated 19.7.1972 is produced on record nor Sauda Book is produced to support the contention of the plaintiff regarding oral contract. Mr.

Mankad submitted there is no averment in the plaint to show as to how the contract was entered into. Mr. Mankad also submitted that the subsequent communications at Ex.36, 39, 41 and 42 do not establish existence of contract dated 19th July, 1972. The Trial Court has given undue weightage to the evidence regarding subsequent visit of one Hasmukhbhai to Anjar for Parakh when neither Hasmukhbhai nor witness-Parikh are examined, who would be material witnesses to show as to in context of which transaction they had gone. He also contended that, even if the case of the plaintiff is accepted at the face value, then also it cannot be considered as a concluded contract. Mr. Mankad, therefore, submitted that the Trial Court has committed an error in passing the decree in question. He, therefore, submitted that the appeal may be allowed.

5. The appeal is opposed to by learned Advocate, Mr. A.C. Gandhi. According to him, the respondent led sufficient evidence to show that there was telephonic communication. Even the appellant did accept that there was telephonic talk on the relevant date. According to Mr. Gandhi, the Trial Court, having accepted the case of the respondent-original plaintiff about the contract

having been entered into and the same having not been acted upon by the appellant-defendant, ought to have decreed the suit in toto. Instead, the Trial Court has committed an error in underestimating the claim of the plaintiff-respondent and passing the decree only in part. He, therefore, submitted that the appeal may be dismissed and the cross-objections may be allowed.

6. This Court has examined the record and proceedings and the evidence led by the parties.

7. There is no dispute on the aspect that the contract claimed to have been entered into between the appellant-defendant and the respondent-plaintiff was an oral contract which was entered into over a telephonic conversation. The appellant-defendant also does not dispute the fact of having talked with the plaintiff on telephone on 19th July, 1972, but the case of the defendant is that there was no contract. The situation that arises, therefore, is that the evidence in this regard is of the nature of word against word. The Court, therefore, would be required to examine other peripheral pieces of evidence led by the parties. In this regard, it appears that the Trial Court has relied

on the evidence Ex.36, 39, 41 and 42, which are written communications from the defendant to the plaintiff. It would be very relevant to record that the plaintiff has been working as a commission agent and there seems to be number of transactions. This Court has examined these documents Ex.36, 39, 41 and 42 and despite all efforts, is not in a position to co-relate these documents in the context of the transaction claimed to have been entered into by the plaintiff with the defendant on 19th July, 1972 over telephone. These letters are more or less in the form of an offer or an invitation for an offer and even the Trial Court has come to that conclusion and, therefore, these documents do not help the case of the plaintiff.

8. The situation that emerges is, for the transaction of 19th July, 1972, except bare say of the plaintiff, there is no evidence and the other documents which are relied upon do not establish existence of such a transaction. On the contrary, Ex.36, 39, 41 and 42 speak of independent proposals or invitation for proposal and do not even refer to any transaction of 19th July, 1972 and, therefore, there seems to be substance in the case of the defendant that, though there was telephonic

talk, there was no contract.

9. The Trial Court has also overlooked the aspect that, as per the plaintiff, the transaction was on the basis of Ahmedabad Dhara Parakh Condition and what is that condition is not explained. If that be the case, Section 29 of the Contract Act would be attracted, which says that contracts, the terms of which are uncertain, are void. Having accepted that the term of contract is uncertain, the contract ought to have been held to be void and, therefore also, the decree could not have been passed.

10. The Trial Court has also given weightage to the oral evidence in respect of subsequent visit of Hasmukhbhai to Anjar for Parakh. The Trial Court seems to have overlooked the aspect that even as per the plaintiff, the condition of the contract was Ahmedabad Parakh and, therefore, visit of Hasmukhbhai to Anjar for Parakh may not be in respect of this transaction but for some other transaction. This possibility is also inferred from the fact that the plaintiff is a commission agent and the defendant has written number of letters making several other offers, where it is offered

that he is prepared to show the sample at Ahmedabad or the plaintiff's man may come and examine the samples. In any eventuality, visit of Hasmukhbhai to Anjar for testing of Parakh cannot be connected with the alleged contract. Likewise, transactions with other firm at Anjar by the plaintiff also could not have been co-related with the alleged breach of contract by the defendant for the aforesaid reasons.

11. Apart from this aspect, for the reasons stated in the foregoing paragraphs, the decree could not have been passed by the Trial Court in favour of the respondent. The appeal deserves to be allowed and is, therefore, allowed. The judgment and decree passed by the Trial Court is hereby set aside. The cross-objections, obviously, would fail when this Court has come to the conclusion that the contract is not established and, therefore, the same are dismissed. No costs.

**[ A. L. DAVE, J. ]**

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